STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2003
v	No. 232863 Kent Circuit Court
VICTORIA LYNN PAYNE, Defendant-Appellant.	LC No. 00-002406-FC

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of solicitation of murder, MCL 750.157b(2), and was sentenced to serve three concurrent terms of thirty to seventy-five years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that her sentences violate the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the crime and the defendant's criminal history. See *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). However, defendant concedes that her sentences are within the range provided for under the statutory guidelines and that, therefore, this Court is precluded by MCL 769.34(10) from considering a challenge based on proportionality. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). Defendant further contends, however, that MCL 769.34(10) violates the separation of powers provision of the Michigan Constitution, as well as the constitutional guarantees of due process and an appeal of right. We do not agree.

The constitutionality of a statute is a question of law that we review de novo. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). However, statutes are accorded a strong presumption of validity and this Court will, therefore, construe a statute as valid absent a clear showing of unconstitutionality. *Id.*

MCL 769.34(10) provides, in relevant part, that "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Defendant argues that this limitation on appellate review of sentencing decisions violates the separation of powers provision of the Michigan Constitution, Const 1963, art 3, § 2, because it infringes on the judiciary's constitutionally granted power to adjudicate and review claims, Const 1963, art 6, §

1. However, as this Court explained in *People v Babcock*, 244 Mich App 64, 68; 624 NW2d 479 (2000), "[t]he ultimate authority to provide for sentencing is constitutionally vested in the Legislature" and has been merely delegated by the Legislature to the courts. *Id*., citing Const 1963, art 4, § 45. Thus, while the authority to administer the sentencing statutes enacted by the Legislature may lie within the judiciary, the authority to determine the parameters of the sentencing scheme in this state remains with the Legislature. See *Babcock*, *supra*. Accordingly, the constitutional provision mandating the separation of governmental powers is not offended by the limits imposed by the Legislature upon the judiciary in MCL 769.34(10). See, e.g., *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001) (in administering the sentencing statutes enacted by the Legislature, the court must act "within the limits set by the Legislature").

The limitations imposed by MCL 769.34(10) similarly do not operate to deny a defendant due process. See Const 1963, art 1, § 17. In arguing to the contrary, defendant cites *Dodge v Detroit Trust Co*, 300 Mich 575; 2 NW2d 509 (1942), wherein our Supreme Court held that denial of due process in a criminal proceeding '"is the failure to observe that fundamental fairness essential to the very concept of justice."' *Id*. at 618, quoting *Lisenba v California*, 314 US 219, 290; 62 S Ct 280; 86 L Ed 166 (1941). However, as noted above, the Michigan Constitution grants the Legislature the ultimate authority to determine the appropriate sentencing scheme for our state. Const 1963, art 4, § 45. Given this broad grant of authority, we do not conclude that it is fundamentally unfair for the Legislature to limit appellate review of sentences imposed within the guidelines range.

Defendant's claim that MCL 769.34(10) violates her right to appeal, as guaranteed by Article I, Section 20 of the Michigan Constitution, is equally without merit. Although MCL 760.34(10) precludes appellate review of the proportionality of a sentence that falls within the statutory sentencing guidelines range, it does not deny review of the scoring of the sentencing guidelines or the accuracy of the information relied upon in determining the sentence. Thus, where, as here, a defendant is sentenced within the guidelines range, appellate review of that sentence is not completely foreclosed by MCL 769.34(10). Accordingly, we are not persuaded that MCL 769.34(10), which merely limits the circumstances in which a defendant can challenge a sentence that adheres to legislatively prescribed requirements, violates the constitutional guarantee of an appeal by right.

Defendant next argues that her sentences are so excessive and disparate as to constitute cruel and unusual punishment. See US Const, Am VIII; Const 1963, art 1, § 16. Again, we disagree. Our Supreme Court has held that a sentence imposed within the range recommended by the judicial sentencing guidelines is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); see also *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Here, as noted above, the sentences imposed by the trial court were within the applicable guidelines range, and defendant offers no reason why the foregoing presumption should not equally apply to sentences imposed within the statutory guidelines. In any event, even were we to find this presumption to be inapplicable here, we note that the sentences imposed are to run concurrently and we do not conclude that a thirty-year minimum sentence for the solicitation of the murders of three people, whose only "transgression" was seeking restitution for money stolen from them by defendant, is excessively severe or disparate. See, e.g., *People v Crawford*, 232 Mich App 608, 621-622; 591 NW2d 669 (1998) (fifteen-year minimum sentence for conviction of soliciting the murder of a

single witness not excessive). In reaching this conclusion, we note that in addition to the three murders defendant solicited and actually made payment on, she approved the murder of a fourth individual if that person happened to simply get "in the way." Given these circumstances, we find no constitutional impediment to the sentences imposed here.

Defendant next argues that the prosecutor denied her a fair trial by making several improper comments during opening and closing arguments. Specifically, defendant asserts that the prosecutor improperly (1) appealed to the jury's sympathy by commenting on the fact that one of the intended victims was an elderly cripple, (2) asked the jury to place itself in the victims' shoes by imagining what it would be like to know that a contract had been placed on your life, and (3) argued facts not in evidence by suggesting that intervention by an undercover police officer was necessary because the police did not have the resources to conduct indefinite surveillance of defendant to ensure that the plot to kill the victims was not carried out. Defense counsel, however, did not object to any of these comments by the prosecutor. Thus, in order to avoid forfeiture of this unpreserved claim of prosecutorial misconduct, defendant must demonstrate plain error that affected the outcome of the trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). No such error will be found if the prejudicial effect of an improper comment could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Even assuming (without deciding) that the challenged comments were improper, we do not conclude that any of the prosecutor's statements affected the outcome of the trial. The evidence on which defendant was convicted included audio tape recordings of defendant discussing her hatred of the victims and contracting for their murders with an undercover police officer. At trial, defendant did not challenge the authenticity of those recordings or, for that matter, that she actually solicited the murders. Rather, her defense was that she never specifically intended the murders to occur and was simply playing out a self-indulgent fantasy. That the jury rejected this defense and convicted defendant of the charged crimes had little, if anything, to do with the comments challenged on appeal. *Schutte, supra*. In any event, a timely objection and special instruction would have cured any prejudice that might have resulted from these comments. *Watson*, *supra*. Accordingly, defendant is entitled to no relief on this claimed error.

We affirm.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Bill Schuette